

HONORABLE JAMES L. ROBART

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

v.

MOTOROLA INC., et al.,

Defendant.

No. C10-1823-JLR

MICROSOFT'S RESPONSE TO THE
COURT'S SEPTEMBER 13, 2013
ORDER TO SHOW CAUSE

MOTOROLA MOBILITY, LLC., et al.,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

MICROSOFT'S RESPONSE TO THE COURT'S
SEPTEMBER 13, 2013 ORDER TO SHOW
CAUSE (C10-1823-JLR)

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1 Microsoft respectfully submits the following response to the Court's September 13,
2 2013 Order to Show Cause.

3 On Wednesday, September 4, 2013, prior to the submission of the case to the jury,
4 Microsoft filed its Rule 50(a) Motion for Judgment as a Matter of Law. (Dkt. No. 902.) The
5 motion asked that the case not be submitted to the jury, and that instead judgment be entered
6 for Microsoft, and presented a number of bases for such relief, including that as to some issues
7 the evidence would not permit a reasonable jury to find for Motorola (*e.g.*, Dkt. 902 at 1–11)
8 and that as to others the governing legal rules required judgment for Microsoft (*e.g.*, *id.* at 11–
9 13). The case was submitted to the jury and the jury returned a verdict for Microsoft, finding
10 that Motorola breached its contract with the IEEE, breached its contract with the ITU, violated
11 the duty of good faith and fair dealing inherent in both contracts by seeking injunctions, and
12 awarding Microsoft damages. (Dkt. No. 909, Verdict Form.)

13 As the Court noted in its September 13 Order to Show Cause, because Microsoft
14 “prevailed at trial . . . the court can no longer provide effectual relief by ruling on this motion.”
15 (Dkt. 915 at 2.) Motorola agrees. (Dkt. 917 at 1.) But although the motion may be moot in
16 the sense that “a ruling for either party would not affect the case in any meaningful way” (Dkt.
17 915 at 2–3), many of the issues and arguments raised in the motion are not themselves moot.
18 Microsoft presented a number of factual and legal arguments which support the verdict reached
19 by the jury based on the Court's instructions,¹ as well as arguments that would support a
20

21 ¹ *E.g.*, Sections I.A–F (Dkt. No. 902 at 1–11), addressing the evidence compelling a finding of breach of the duty
22 of good faith and fair dealing; Section II (*id.* at 11–13), concerning Motorola's conduct in pursuing (as opposed to
23 simply filing) actions for injunctions; Section IV (*id.* at 14), arguing that Motorola's rejection of Microsoft's
24 above-RAND Orange Book offer was a breach of its ITU contract; Section VI (*id.* at 17–18), arguing that
25 Motorola breached the IEEE contract by failing to make licenses available at nominal competitive costs; Section
26 VII (*id.* at 19), arguing that Motorola breached both the IEEE and ITU contracts by failing to make licenses
available on RAND terms; Section VIII (*id.* at 19–21), arguing that Motorola's Orange Book mitigation and
causation arguments failed; Section IX (*id.* at 21–22), arguing that Microsoft's defenses of invalidity and
noninfringement are irrelevant; and Section XI (*id.* at 23–24), arguing that all three Motorola defendants may be
held liable for Motorola's conduct.

1 judgment in Microsoft's favor based on a view of governing law advocated by Microsoft but
 2 not accepted by the Court.² These issues are still hotly disputed between the parties, as
 3 evidenced by Motorola's post-trial filings (*see* Dkt. No. 917 at 2–24), and Microsoft expects
 4 that Motorola will continue to contest these issues on appeal.

5 For this reason, out of abundance of caution and to avoid any possible Motorola
 6 arguments concerning surprise or waiver, and because Microsoft's motion was unquestionably
 7 proper when filed, Microsoft believes that withdrawing its motion is not the appropriate
 8 course. In addition, with respect to the legal issues as to which the Court disagreed with
 9 Microsoft, for example, whether the RAND commitment categorically precludes injunctive
 10 relief, if at any subsequent stage it is determined that the jury should have been instructed as
 11 Microsoft proposed, the result would be not a new trial but simply an affirmance of the
 12 judgment on that alternative ground. Finally, to the extent that Motorola seeks a new trial
 13 because of, for example, claimed errors in certain jury instructions, Microsoft's pre-verdict
 14 JMOL motion shows that any such error, even if it occurred, is irrelevant because the case
 15 should not have gone to the jury in any event.

16 Therefore, for the foregoing reasons, Microsoft believes that because the Court has
 17 determined that it cannot rule on the motion in a way that would have a meaningful effect on
 18 the rights of either party, the Court can simply deny Microsoft's Rule 50(a) motion as moot.

19
 20 DATED this 18th day of September, 2013.

21 CALFO HARRIGAN LEYH & EAKES LLP

22
 23 By s/Arthur W. Harrigan, Jr.
 24 Arthur W. Harrigan, Jr., WSBA #1751

25 ² *E.g.*, Section III (Dkt. No. 902 at 13–14), arguing that Motorola breached its contracts by seeking injunctions
 26 without having first attempted to offer a license on RAND terms; Section V (*id.* at 15-17), arguing that Motorola
 breached by seeking injunctions at all on its standard-essential patents; and Section X (*id.* at 22-23), arguing that
 Motorola breached by making blatantly unreasonable offers.

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CERTIFICATE OF SERVICE

I, Florine Fujita, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
2. On the 18th day of September, 2013, I caused the preceding document to be served on counsel of record in the following manner:

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